

Montana Water Court  
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**FILED**  
07/12/2023  
Sara Calkins  
CLERK  
Montana Water Court  
STATE OF MONTANA  
By: D'Ann CIGLER  
43B-0902-R-2022  
Lambert, Kathryn  
5.00

MONTANA WATER COURT, YELLOWSTONE DIVISION  
YELLOWSTONE RIVER ABOVE AND INCLUDING BRIDGER CREEK BASIN  
BASIN 43B  
PRELIMINARY DECREE

\*\*\*\*\*

CLAIMANTS: Brent A. Berg; Robin L. Berg; Ava Riccardi; Erin E.  
Schwartz; Yellowstone Trails Ranch Homeowners Assn

**CASE 43B-0902-R-2022**  
43B 125017-00

**NOTICE OF FILING OF MASTER'S REPORT**

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

**MASTER'S REPORT**

This claim appeared in the Preliminary Decree with the following issue remark:

THE CLAIMED VOLUME EXCEEDS THE MAXIMUM FEASIBLE VOLUME. BASED ON THE FLOW RATE AND PERIOD OF USE, THE MAXIMUM VOLUME POSSIBLE IS 164.69 ACRE-FEET PER YEAR.

The remark was not addressed through the objection process. The Water Court is required to resolve the issues raised by each issue remark. Section 85-2-248, MCA.

The ditch identified on the abstract for this claim in the Preliminary Decree is Mill Creek Flat Ditch. During preparation of the Preliminary Decree, the point of diversion legal description was changed to the legal description for Upland Ditch, not for Mill Creek Flat Ditch. As there were multiple claims for Upland Ditch and Mill Creek Flat Ditch and apparent confusion over the correct legal description for the headgate for each ditch, the Court requested assistance from DNRC to determine the correct point of diversion legal descriptions and to prepare a marked aerial photograph for the Court and various claimants to use to determine the correct ditch and its point of diversion legal description. On February 26, 2021 the DNRC provided a new marked aerial photograph copy. This new marked aerial photograph was attached to the December 14, 2022 Order Consolidating Case And Setting Scheduling Conference.

The April 25, 2023 Court Minutes And Order Setting Filing Deadline states:

The claimants all agreed the Court could memorialize resolution of the volume issue remark in these Minutes: All claimants agree to keep the volume quantity as it appears on the Preliminary Decree abstract.

For the ditch name/legal description issue, Mr. Waggoner will speak with Keith Neal, then contact the other claimants. They agreed to a filing deadline concerning this issue. Therefore, it is

ORDERED that the deadline is **May 25, 2023** for all claimants to file documentation specifying the ditch name/legal description.

Nothing was filed by the claimants. The May 31, 2023 Order Setting Show Cause Deadline states:

The Statement of Claim indicates that Mill Creek Flat Ditch is the diversion for this claimed right. The Preliminary Decree states that the right is diverted by Mill Creek Flat Ditch and the point of diversion is in the NENENW section 3, T6S, R9E, PARK. This is the legal description for Upland Ditch stated on the new marked aerial photograph prepared by the DNRC. For Mill Creek Flat Ditch, the point of diversion legal description is NESWNE section 3, T6S, R9E, PARK as stated on the new marked aerial photograph prepared by the DNRC. Therefore, it is

ORDERED that the deadline is **June 30, 2023** for the claimants to file a written statement showing cause why the Court should not change the point of diversion legal description to the NESWNE section 3, T6S, R9E, PARK. If not filed by this deadline, the Court will conclude the claimants agree with this

change and will proceed with changing the claim as detailed above.

Nothing was filed. The Stipulation is viewable in the Court's FullCourt Enterprise case management system.

#### APPLICABLE LAW

"All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section." Section 85-2-248(2), MCA.

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

#### FINDINGS OF FACT

1. The Preliminary Decree states that the volume is 168.88 ACRE-FEET. There is no change to be made to the volume. The volume issue remark should be removed as addressed and resolved.

2. The Preliminary Decree states that the point of diversion legal description is the NENENW section 3, T6S, R9E, PARK. The legal description should be the NESWNE section 3, T6S, R9E, PARK. The ditch name is already correctly appearing on the abstract as MILL CREEK FLAT DITCH.

3. The Preliminary Decree also includes the following remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT ARE FILED ON THE SAME FORMERLY DECREED WATER RIGHT. THE SUM OF THE CLAIMED FLOW RATES EXCEEDS THE 115 MINER'S INCHES DECREED IN CASE NO. 7583 , PARK COUNTY. 125017-00, 194340-00, 194471-00, 194475-00, 30430-00, 194336-00.

For the decree exceeded issue remark, review of all the claims identified in the remark shows that there are two sets of multiple use claims, and that the calculated flow rate total did not take that into consideration. For the multiple use claims, the flow rate should only be counted once when reviewing whether there is a decree exceeded issue. In this instance, the claimed flow rate total is actually the exact amount of the decreed right being claimed: 115 miner's inches. The decree exceeded issue remark does not require further proceedings and should

be removed.

4. The Preliminary Decree also includes the following remark:

THE WATER RIGHTS LISTED FOLLOWING THIS STATEMENT WERE FILED BY DIFFERENT PARTIES WHO CLAIM OVERLAPPING PLACES OF USE. 43B 125013-00, 43B 125014-00, 43B 125015-00, 43B 125016-00, 43B 125017-00.

When a claim's place of use overlaps with places of use of other water right claims owned by other parties, the above remark is added. This overlapping ownership remark gives parties notice and the opportunity to object to and seek modification to the place of use to avoid having water rights appear appurtenant to land they do not own. If no party objects after receiving notice, no further proceedings are necessary. As no objection was filed, this remark should be removed as having served its notice purpose.

5. The Preliminary Decree also includes the following remark:

POINT OF DIVERSION WAS MODIFIED AS A RESULT OF DNRC REVIEW UNDER MONTANA WATER COURT REEXAMINATION ORDERS. IF NO OBJECTIONS ARE FILED TO THIS CLAIM, THESE ELEMENTS WILL REMAIN AS THEY APPEAR ON THIS ABSTRACT AND THE REMARK WILL BE REMOVED FROM THE CLAIM.

The remark provides notice of this change prior to issuance of the Preliminary Decree. This remark should be removed as having served its notice purpose.

#### CONCLUSIONS OF LAW

1. The information provided in the claimants as memorialized in the April 25, 2023 Court Minutes is sufficient to resolve the volume issue remark without evidentiary hearing. Sections 85-2-248(3) and (11), MCA.

2. The Statement of Claim and the new DNRC marked aerial photograph are sufficient to contradict and overcome the prima facie claim as incorrectly modified prior to issuance of the Preliminary Decree.

#### RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact to correct the Preliminary Decree for this Basin. A Post Decree Abstract of Water Right Claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

#### **ELECTRONICALLY SIGNED AND DATED BELOW**

**Service via USPS Mail:**

Brent A. Berg  
Robin L. Berg  
15 Packstring Trail  
Livingston, MT 59047

Ava Riccardi  
17 Rosemary Ln  
Livingston, MT 59047

Erin E. Schwartz  
1350 23<sup>rd</sup> Ave N  
Clinton, IA 52732

Yellowstone Trails Ranch Homeowners Assn  
01 Morgan Trail  
Livingston, MT 59047

**POST DECREE**  
**ABSTRACT OF WATER RIGHT CLAIM**  
**YELLOWSTONE RIVER, ABOVE & INCLUDING BRIDGER CREEK**  
**BASIN 43B**

**Water Right Number:** 43B 125017-00 STATEMENT OF CLAIM  
**Version:** 4 -- POST DECREE  
**Status:** ACTIVE

**Owners:** YELLOWSTONE TRAILS RANCH HOMEOWNERS ASSN  
1 MORGAN TRL  
LIVINGSTON, MT 59047 8723  
  
BRENT A BERG  
15 PACKSTRING TRAIL  
LIVINGSTON, MT 59047  
  
ROBIN L BERG  
15 PACKSTRING TRAIL  
LIVINGSTON, MT 59047  
  
ERIN E SCHWARTZ  
212 SYLVIA WAY  
SAN RAFAEL, CA 94903 3144  
  
AVA RICCARDI  
17 ROSEMARY LN  
LIVINGSTON, MT 59047 4008

**Priority Date:** JUNE 1, 1908  
**Type of Historical Right:** DECREED  
**Purpose (use):** IRRIGATION  
**Irrigation Type:** FLOOD  
**Flow Rate:** 242.00 GPM  
**Volume:** 168.88 AC-FT  
**Climatic Area:** 4 - MODERATELY LOW  
**Maximum Acres:** 60.00  
**Source Name:** MILL CREEK  
**Source Type:** SURFACE WATER

**Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NESWNE	3	6S	9E	PARK

**Period of Diversion:** MAY 15 TO OCTOBER 15  
**Diversion Means:** HEADGATE  
**Ditch Name:** MILL CREEK FLAT DITCH  
**Period of Use:** MAY 15 TO OCTOBER 15

**Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1	60.00			18	5S	9E	PARK
<b>Total:</b>	60.00						

THE PLACE OF USE IS IN TRACT 8 CERTIFICATE OF SURVEY NO. 258 , PARK COUNTY.

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**Remarks:**

THE WATER RIGHTS FOLLOWING THIS STATEMENT ARE SUPPLEMENTAL WHICH MEANS THE RIGHTS HAVE OVERLAPPING PLACES OF USE. THE RIGHTS CAN BE COMBINED TO IRRIGATE ONLY OVERLAPPING PARCELS. EACH RIGHT IS LIMITED TO THE FLOW RATE AND PLACE OF USE OF THAT INDIVIDUAL RIGHT. THE SUM TOTAL VOLUME OF THESE WATER RIGHTS SHALL NOT EXCEED THE AMOUNT PUT TO HISTORICAL AND BENEFICIAL USE.

125013-00      125014-00      125015-00      125016-00      125017-00      125018-00

AUTHORIZATION TO CHANGE THE POINT OF DIVERSION & PLACE OF USE ISSUED 06/03/1997. NOTICE OF COMPLETION DUE 12/31/1998. SEE 43B 125017-00